LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 7 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 1195

HEXAGON LABORATORIES, INC.,

Petitioner,

vs.

THE UNITED STATES,

Appellee.

PETITION OF HEXAGON LABORATORIES, INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BERNARD A. GROSSMAN
Attorney for Petitioner
1 Wall Street
New York, New York

BERNARD A. GROSSMAN
On the Brief

INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

1. The Government of the United States, even when it genuinely needs certain materials, should be held to a standard of reasonable conduct in satisfying such needs 5

2. The United States should not be permitted to cancel a contract for the sale of Government property without liability for damages to the purchaser when such contract has been cancelled unnecessarily 5

3. The decision below effectively nullifies important limitations upon the Sovereign Immunity Doctrine 7

   a. The Sovereign Immunity Doctrine does not apply when the Agency of the United States, the actions of which caused damage to a private party, is the same Agency which contracted with such party 7

   b. The Sovereign Immunity Doctrine does not apply when the action of the United States which has caused the loss is unreasonable 8

PAGE

c. The Sovereign Immunity Doctrine does not apply when the action of the United States which has caused the loss is not general in application but is directed solely at one or a very limited number of parties 9

4. The Strategic and Critical Materials Stockpiling Act, 50 U.S.C. §§98 et seq., does not give the United States Government the right to cancel a contract of sale without recourse to the other party who entered into the contract in good faith 10

CONCLUSION 12

APPENDIX A—Opinion and Order of Court of Claims 13

APPENDIX B—Pertinent Text 50 U.S.C. §§98, 98(a)(e) 14

APPENDIX C—Pertinent Text of Contract 21

Table of Authorities

Cases: PAGE

Appeal of Empire Gas Engineering Co., 1962 B.C.A. 17, 122 (Board of Contract Appeals, 1962) 8

Beuttas v. United States, 111 Ct. Cl. 532 (1948) 8

Freedman v. United States, 320 F. 2d 359 (Ct. Cl., 1963) 6

Horowitz v. United States, 267 U. S. 458 (1925) 7, 8

Lynch v. United States, 292 U. S. 571 (1934) 6

Metal Exports, Inc. v. United States, 137 Ct. Cl. 258 (1957) 8

Miller v. United States, 135 Ct. Cl. 1 (1956) 9

Ottinger v. United States, 116 Ct. Cl. 282 (1951) 8

Sunswick Corp. v. United States, 109 Ct. Cl. 772 (1948) 9

Statutes:

Strategic and Critical Materials Stockpiling Act, 50 U.S.C. §§98, 98(a)-(e) 2, 4, 5, 10, 11

28 U.S.C. 1255(1) 2

28 U.S.C. 1491(4) 3

Code of Federal Regulations, Title 13, Part 121.3-9, as amended 3

Other Authorities:

1946 U. S. Code Congressional Service 1290 11

IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. .....

HEXAGON LABORATORIES, INC.,

Petitioner,

vs.

THE UNITED STATES,

Appellee.

PETITION OF HEXAGON LABORATORIES, INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Hexagon Laboratories, Inc., (hereinafter referred to as "petitioner" or "plaintiff"), the plaintiff below, prays that a writ of certiorari issue to review the opinion and order of the United States Court of Claims entered in the above case on January 7, 1966.

Opinion Below

The opinion and order of the United States Court of Claims with respect to which petitioner here seeks certiorari is dated January 7, 1966. It grants the motion of The United States (hereinafter sometimes referred to as "defendant"), the defendant below, for summary judgment and dismisses the petition of the plaintiff.

The opinion and order is as yet unreported and is printed at Appendix A.

Jurisdiction

The opinion and order of the United States Court of Claims is dated January 7, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

Questions Presented

1. The over-riding question in this case is whether the Government of the United States, even when it genuinely needs certain materials, should be held to a standard of reasonable conduct in satisfying such needs.

2. May the United States, as a contracting party, unilaterally cancel a contract for the sale of Government property and obtain the benefit of a damage limitation clause in such contract, to the great damage of a purchaser, when such cancellation is on the ground that a need for the sold property has arisen when such need can, in fact, be met by methods other than the cancellation of such contract?

3. Does the decision of the Court of Claims nullify important limitations previously found to apply to the Doctrine of Sovereign Immunity?

4. Does the Strategic and Critical Material Stockpiling Act, 50 U.S.C. §§98 *et seq.*, give the United States Government the right to cancel a valid contract of sale without any recourse to the other party who entered into the contract in good faith?

Statutes Involved

50 U.S.C. §§98, 98(a)-(e). Pertinent text set forth in Appendix B.

Statement of the Case

The jurisdiction of the United States Court of Claims was invoked below under 28 U.S.C. 1491(4).

The plaintiff is a "Small Business" within the definition as set forth in the Code of Federal Regulations, Title 13, Part 121.3-9, as amended. It is engaged in the manufacture, from raw materials, of pharmaceuticals and other chemical products.

Prior to the purchase of the quinine herein involved, the plaintiff was the sole domestic manufacturer of the drug known as quinidine. Quinidine is used primarily in the treatment of heart disease and is a relatively new development in the pharmaceutical field.

In March, 1962, the plaintiff was awarded the contract which is in issue in this case, the pertinent parts of which are reproduced in Appendix C, under which the United States agreed to sell to the plaintiff 2,240,767 ounces of quinine sulfate powder for a total price of $467,400. Quinine sulfate powder is the basic raw material used in the manufacture of quinidine. This award was obtained only after strenuous efforts on the part of the plaintiff to convince the Government that it should set aside a meaningful portion of its surplus stocks of quinine sulfate powder for purchase by small businesses.

After receiving the award the plaintiff expended considerable sums in research and in the conversion of its manufacturing plant so as to be able to utilize the quinine sulfate powder for the manufacture of quinidine. The plaintiff also expended money and effort in attempting to create, for this drug, a market which would enable it to manufacture and sell it at a fair and reasonable profit.

Under the terms of the contract entered into pursuant to the award the plaintiff was to withdraw one-fifth (1/5) of the entire amount of quinine sulfate powder during each twelve-month period of the five-year contract. Prior to September, 1964, the plaintiff had withdrawn from the Government stockpiles, 1,146,324 ounces of the quinine sulfate powder. Under the contract it was still entitled to withdraw 1,094,443 ounces.

On September 4, 1964, the United States, after some discussion with representatives of the plaintiff, notified the plaintiff that it was unilaterally cancelling the contract under the provisions of the Strategic and Critical Materials Stock Piling Act, 50 U.S.C. 98 *et seq.* The reason for taking such action was stated to be the new stockpile objective set for quinine by the Office of Emergency Planning in view of the increased defense requirements for the drug.

At the time the Government acted to cancel the contract, an amount of quinine equal to that to which plaintiff was then entitled to withdraw under the contract could have been purchased by the Government in the open market although, at a price higher than the contract price. It was not at this point economically feasible for the plaintiff to continue to convert quinine purchased at the world market price.

After being notified of the unilateral termination of the contract by the defendant the plaintiff proceeded to bring this suit for the difference between the contract price of the quinine sulfate powder and the market price of an identical amount of the powder at the time of the termination. The amount claimed was calculated by estimating the average cost of a like amount of quinine sulfate powder over the remaining period of the contract which, at the time of termination, was approximately three (3) years.

In lieu of answer the United States moved by motion for summary judgment to dismiss the petition. Defendant in its motion relied primarily on the damage limitation clause in the contract, the Sovereign Immunity Doctrine, and the provisions of the Strategic and Critical Materials Stockpiling Act, 50 U.S.C. §§98 *et seq.*

Reasons for Granting the Writ

1. ***The Government of the United States, even when it genuinely needs certain materials, should be held to a standard of reasonable conduct in satisfying such needs.***

The Court of Claims has held below that, since the Government's need for quinine was admitted, no further justiciable issue was presented.

By its ruling, in this case the Court of Claims has abrogated the standards of conduct to which the Government had previously been held. It has freed the Government from all reasonable restraints, as hereinafter discussed, and in this area would permit the Government to act arbitrarily and capriciously, to satisfy its needs in any manner it sees fit. The doctrine of the Court of Claims in this case is that the need justifies the means.

Petitioner urges the Supreme Court of the United States to review this ruling in order to authoritatively re-affirm the existence of standards of conduct applicable to the Government in this area and authoritatively define the nature and extent of those standards.

2. ***The United States should not be permitted to cancel a contract for the sale of Government property without liability for damages to the purchaser when such contract has been cancelled unnecessarily.***

In view of the increased demands upon the nation's raw material stockpiles which must result from the conflict in

Viet Nam it is essential that this Court determine the rights of purchasers of Government property whose contracts are cancelled when a defense need for such property arises.

Contrary to the apparent view of the Court below, plaintiff's position was not that the defendant had no need for the quinine. Plaintiff accepted the fact that such a need had arisen but showed that the defense requirements could have been met on the open market and therefore the cancellation of plaintiff's contract could have been avoided.

If General Condition 11, of the contract, which limits the Government's liability thereunder only to the amount actually paid by the purchaser is applied without limitation such contracts would create no real obligations on the part of our Government when it enters into contracts with private individuals or corporations. Such contracts could be cancelled capriciously with no liability on the part of the United States other than the return of the purchase price.

The Court of Claims has consistently limited such escape clauses, permitting them to be applied only where cancellation of a contract was the only reasonable method by which the United States could accomplish some necessary purpose. *Freedman* v. *United States,* 320 F. 2d 359 (Ct. Cl., 1963).

The opinion below which is based upon the fact "that plaintiff has raised no litigable issue as to the reality of the defendant's need" ignores the fact that while accepting this need the plaintiff showed that the needed material was available on the open market and thus there was a reasonable alternative to cancelling the plaintiff's contract in order to meet this need.

The defendant cannot be heard to argue that the increased cost of purchasing on the open market was reason to cancel the contract. *Lynch* v. *United States,* 292 U. S. 571 (1934).

It is submitted that if the decision below stands it will play havoc with the previously imposed limitations upon the Government's power to divest itself of its contractual obligations without liability.

3. *The decision below effectively nullifies important limitations upon the Sovereign Immunity Doctrine.*

In the Court of Claims the defendant argued that its act of cancelling its contract with the plaintiff was a "Sovereign Act" and that therefore the plaintiff had no cause of action.

The so-called Sovereign Immunity Doctrine was stated by this Court in *Horowitz* v. *United States,* 267 U. S. 458 (1925). In that case Mr. Justice Sanford said at page 461:

> "The United States, when sued as a contractor, cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign."

Just as in the case of the clause limiting the liability of the United States under its contracts the courts have found it necessary to limit the application of this doctrine so as to prevent the Government from running roughshod over those parties with which it enters into contracts.

If the decision below is allowed to stand at least three of these limitations will be violated.

a. The Sovereign Immunity Doctrine does not apply when the Agency of the United States, the actions of which caused damage to a private party, is the same Agency which contracted with such party.

The basic difference between the case at bar and those cases in which the rule of the *Horowitz* case may be followed is that the act complained of herein, the cancellation of the contract, is not the act of the Government as a

sovereign but is the act of the Government only in its capacity as a contracting party.

When the same Government Agency which enters into a contract takes the very action which causes the loss to the plaintiff there can be no application of the sovereign immunity theory as stated in the *Horowitz* case. *Beuttas* v. *United States,* 111 Ct. Cl. 532 (1948); *Appeal of Empire Gas Engineering Co.,* 1962 B.C.A. 17, 122 (Board of Contract Appeals 1962).

The justification for this limitation is clear. It would be entirely inequitable to allow the same agency that contracts with an individual to have a ready means available to breach the contract by claiming that in breaching the contract it was acting as a sovereign. If this exception to the sovereign act doctrine did not exist, any Government agency could, if it desired to be free of its contractual obligations, be immune from an action for damages by claiming that it was simply acting as a sovereign when it cancelled a contract which had, for some reason, become unfavorable.

It is submitted that where, as here, General Services Administration entered into a contract with the plaintiff and it is then the very same General Services Administration which cancels the contract, there is no justification for applying the rule of the *Horowitz* case in order to insulate the defendant from the consequences of its breach.

b. The Sovereign Immunity Doctrine does not apply when the action of the United States which has caused the loss is unreasonable.

An act will not be held to be a sovereign act within the *Horowitz* Doctrine if there is no justification therefor. *Ottinger* v. *United States,* 116 Ct. Cl. 282 (1951); *Metal Exports, Inc.* v. *United States,* 137 Ct. Cl. 258 (1957).

In the case at bar, where the Government cancelled its contract with plaintiff while the easy alternative of replenishing the quinine stock piles by purchases on the open market existed, it is submitted that such cancellation can only be described as arbitrary and without justification.

In addition, it is significant that there is no dispute with respect to the fact that the plaintiff was at all times ready to cooperate with the Government to help it to obtain its stockpile quota on the open market. See *Miller* v. *United States,* 135 Ct. Cl. 1 (1956).

c. The Sovereign Immunity Doctrine does not apply when the action of the United States which has caused the loss is not general in application but is directed solely at one or a very limited number of parties.

In the instant case, it is clear that the action taken by the Government was not general in its scope and cannot therefore be classified as a sovereign act entitling the Government to exemption. *Sunswick Corp.* v. *United States,* 109 Ct. Cl. 772 (1948).

Termination of the contract herein was a specific act directed at the plaintiff and one other purchaser. While the establishment of a stockpile objective might be classified as a sovereign act, that is not the act of which the plaintiff complains. The act taken by the Government, without any statutory or other authority, from which plaintiff seeks relief is the termination of the contract. Only the plaintiff and one other were affected by this termination. Therefore, in no way can the action by the General Services Administration be classified as a sovereign act of general application. Further, evidence showing that the Government directed its action directly at the plaintiff is established by the fact that the exact amount of quinine ordered to be

stockpiled was the exact amount left under the contracts which was yet to be delivered to the plaintiff and to the other purchaser whose contract was cancelled. Clearly the Government's act was directed at plaintiff and, therefore, the Government's contention herein that a distinction should be drawn between the Government as contractor and the Government as sovereign does not apply.

4. *The Strategic and Critical Materials Stockpiling Act, 50 U.S.C. §§98 et seq., does not give the United States Government the right to cancel a contract of sale without recourse to the other party who entered into the contract in good faith.*

On its motion for summary judgment the defendant argues that the language in the Strategic and Critical Materials Stockpiling Act, 50 U. S. C. Sec. 98 *et seq.* required the defendant to withdraw the quinine sulfate from sale and cancel the plaintiff's contract for the purchase thereof. It is submitted that a careful reading of the relevant portions of the statute shows that the Government position is untenable in this respect and that, in fact, the action of the Government in cancelling the plaintiff's contract herein was actually in contravention of the precise terms of the act.

In Section 6 of the Stockpiling Act, 50 U. S. C. Sec. 98(e), subsection (a) thereof states that when a material is determined to be "strategic and critical" such material, "shall be transferred by the owning agency, when determined by such agency to be surplus to its needs and responsibilities, to the stockpiles established pursuant to Sections 98-98h of this title, . . ." The key phrase here would seem to be the words "surplus to its needs and responsibilities." Inasmuch as the General Services Administration had made a binding contract with the plaintiff to deliver, to the plaintiff, a stated quantity of quinine

sulfate, it can hardly be contended that the quinine sulfate which was subject to this contract was surplus to the responsibilities of the transferring agency. If under the Stockpiling Act it had been the intention of the Congress to permit the Government to transfer any material considered to be strategic, whether or not such material might be subject to a contract, such as that which plaintiff had with the Government in the case at bar, it would seem that the language "surplus to its . . . responsibilities" would be meaningless and mere surplusage. It is submitted that as long as the General Services Administration had an obligation to supply quinine under its contract with the plaintiff there was no authority under the Stockpiling Act for the transfer of this quinine to the stockpiles and therefore it may not be argued that the terms of the Act required the General Services Administration to cancel the plaintiff's contract.

Furthermore, in its comments on the statute, the Congress specifically stated that purchase of materials under the Stockpiling Act should be so far as possible, "in excess of the current needs of industry and at a price not greater than current open market price" 1946 U. S. Code Congressional Service 1290. To permit cancellation of plaintiff's contract herein, when the material needed for the stock pile could have been obtained on the open market, would therefore annul the expressed intent of Congress in passing this act. There is no question that the plaintiff was in need of the quinine sulfate in order to continue its production of quinidine, for which, incidentally, a stock pile objective had also been set. It should be further noted that the above quoted policy statement specifically indicates that Congress recognized that the Government would, on occasion, be forced to enter the open market in order to meet its stock pile requirements.

CONCLUSION

This case presents fundamental questions concerning the rights of those who deal with our Government. If the decision below stands several time worn limitations upon the right of the Government to cancel a contract without liability for damages will be swept away.

In addition, the interpretation of a statute of utmost importance during this period of our history has been drawn into serious dispute. If the Government's view of this statute is upheld the status of many Government contracts will be in question.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD A. GROSSMAN
Attorney for Petitioner
1 Wall Street
New York, New York

BERNARD A. GROSSMAN
On the Brief

APPENDIX A

(Order)

IN THE UNITED STATES COURT OF CLAIMS

No. 68-65

HEXAGON LABORATORIES, INC.

v.

THE UNITED STATES

This case comes before the court on defendant's motion for summary judgment. Upon consideration thereof, together with the opposition thereto and the briefs of the parties, and without oral argument, it is concluded that plaintiff has raised no litigable issue as to the reality of the defendant's need and that on the basis of *Freedman* v. *United States,* 162 Ct. Cl. 390, 320 F. 2d 359 (1963), and *Benjamin* v. *United States,* Ct. Cl. No. 538-52, decided July 16, 1965, 348 F. 2d 502, plaintiff is not entitled to recover, and

IT IS ORDERED that defendant's motion for summary judgment be and the same is granted and plaintiff's petition is dismissed.

BY THE COURT

WILSON COWEN
Chief Judge

Jan. 7, 1966

APPENDIX B

Strategic and Critical Materials Stock Piling Act, 50 U.S.C. § 98 et seq.:

§ 98. *Declaration of policy*

The natural resources of the United States is certain strategic and critical materials being deficient or insufficiently developed to supply the industrial, military, and naval needs of the country for common defense, it is the policy of the Congress and the purpose and intent of sections 98-98h of this title to provide for the acquisition and retention of stocks of these materials and to encourage the conservation and development of sources of these materials within the United States, and thereby decrease and prevent whereever possible a dangerous and costly dependence of the United States upon foreign nations for supplies of these materials in time of national emergency. June 7, 1939, c. 190, § 1, 53 Stat. 811; July 23, 1946, c. 590, 60 Stat. 596.

§ 98a. *Strategic and critical materials; determination; quantity and quality to be purchased; formation and functions of industry advisory committees; subsistence and traveling expenses of members*

(a) To effectuate the policy set forth in section 98 of this title the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Interior, acting jointly through the agency of the Army and Navy Munitions Board, are authorized and directed to determine, from time to time, which materials are strategic and critical under the provisions of sections 98-98h of

this title and to determine, from time to time, the quality and quantities of such materials which shall be stock piled under the provisions of said sections. In determining the materials which are strategic and critical and the quality and quantities of same to be acquired the Secretaries of State, Treasury, Agriculture, and Commerce shall each designate representatives to cooperate with the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Interior in carrying out the provisions of said sections.

• • • • •

§ 98b. *Purchase, storage, refinement, rotation, and disposal of materials*

The Secretary of the Army and the Secretary of the Navy shall direct the Administrator of General Services to—

(a) make purchases of strategic and critical materials with due regard to the objectives set forth in section 98 of this title and pursuant to the determinations as provided in section 98a of this title, which purchases (1) shall be made, so far as is practicable, from supplies of materials in excess of the current industrial demand and (2) shall be made in accordance with sections 10a-10c of Title 41, but may be made without regard to section 5 of Title 41. A reasonable time (not to exceed one year) shall be allowed for production and delivery from domestic sources and in the case of any such material available in the United States but which has not been developed commercially, the Secretary of the Army and the Secretary of Navy may, if they find that the production of such material

is economically feasible, direct the purchase of such material without requiring the vendor to give bond;

(b) provide for the storage, security, and maintenance of strategic and critical materials for stockpiling purposes on military and naval reservations or other locations, approved by the Secretary of the Army and the Secretary of the Navy;

* * * * *

(e) dispose of any materials held pursuant to sections 98-98h of this title which are no longer needed because of any revised determination made pursuant to section 98a of this title, as hereinafter provided. No such disposition shall be made until six months after publication in the Federal Register and transmission of a notice of the proposed disposition to the Congress and to the Armed Services Committee of each House thereof. Such notice shall state the reasons for such revised determination, the amounts of the materials proposed to be released, the plan of disposition proposed to be followed, and the date upon which the material is to become available for sale or transfer. The plan and date of disposition shall be fixed with due regard to the protection of the United States against avoidable loss on the sale or transfer of the material to be released and the protection of producers, processors, and consumers against avoidable disruption of their usual markets; *Provided,* That no material constituting a part of the stock piles may be disposed of without the express approval of the Congress except where the revised determination is by reason of obsolescence of that material for use in time of war.

For the purposes of this paragraph a revised determination is by reason of obsolescence if such determination is on account of (1) deterioration, (2) development or discovery of a new or better material or materials, or (3) no further usefulness for use in time of war. June 7, 1939, c. 190, § 3, 53 Stat. 811; July 23, 1946, c. 590, 60 Stat. 597; Aug. 2, 1946, c. 753, Title I, §§ 102, 121, 60 Stat. 815, 822; July 26, 1947, c. 343, Title II, § 205(a), 61 Stat. 501; June 30, 1949, c. 288, Title I, § 102(a), 63 Stat. 380.

• • • • •

§ 98d. *Release of stock pile materials*

The stock piles shall consist of all such materials prior to July 23, 1946, purchased or transferred to be held pursuant to sections 98-98h of this title, or after July 23, 1946, transferred pursuant to section 98e of this title, or after July 23, 1946, purchased pursuant to section 98b of this title, and not disposed of pursuant to sections 98-98h of this title. Except for the rotation to prevent deterioration and except for the disposal of any material pursuant to section 98b of this title, materials acquired under sections 98-98h of this title shall be released for use, sale, or other disposition only (a) on order of the President at any time when in his judgment such release is required for purposes of the common defense, or (b) in time of war or during a national emergency with respect to common defense proclaimed by the President, on order of such agency as may be designated by the President. June 7, 1939, c. 190, § 5, 53 Stat. 812; July 23, 1946, c. 590, 60 Stat. 598.

Appendix B

§ 98e. *Transfer of surplus materials to stock piles; exceptions; payments; reduction of amount of obligations of Reconstruction Finance Corporation*

(a) Pursuant to regulations issued by the General Services Administration, every material determined to be strategic and critical pursuant to section 98a of this title, which is owned or contracted for by the United States or any agency thereof, including any material received from a foreign government under an agreement made pursuant to sections 411, 412, 413-419 of Title 22, or other authority, shall be transferred by the owning agency, when determined by such agency to be surplus to its needs and responsibilities, to the stock piles established pursuant to sections 98-98h of this title, so long as the amount of the stock pile for that material does not exceed the quantities determined therefor pursuant to section 98a of this title. There shall be exempt from this requirement such amount of any material as is necessary to make up any deficiency of the supply of such material for the current requirements of industry as determined by the Secretary of Commerce. There shall also be exempt from this requirement (1) any material which constitutes contractor inventory if the owning agency shall not have taken possession of such inventory, (2) such amount of any material as the Army and Navy Munitions Board determines (i) are held in lots so small as to make the transfer thereof economically impractical; or (ii) do not meet or cannot economically be converted to meet, stock-pile requirements determined in accordand with section 98a of this title. The total material

transferred to the stock piles established by sections 98-98h of this title in accordance with this section during any fiscal year beginning more than twelve months after July 23, 1946 shall not exceed in value (as determined by the Secretary of the Treasury on the basis of the fair market value at the time of each transfer) an amount to be fixed by the appropriation Act or Acts relating to the acquisition of materials under sections 98-98h of this title.

APPENDIX C

(See Opposite) ☞

STANDARD FORM
MARCH 1960
PRESCRIBED BY GENERAL
SERVICES ADMINISTRATION
REGULATION 1-IV-203.00

CONTRACT GS-COP(S)12954(SCM)

FEDERAL REGISTER: DISPOSAL

Sale

GOVERNMENT PROPERTY

QUININE SULPHATE POWDER

PAGE NO 1 OF 9 PAGES OF
INVITATION NO. MPAR-(S)-43
DATED February 23, 1962

Sealed bids in Triplicate subject to the terms and conditions set forth herein, for the purchase and removal of the Government-owned property listed in this Invitation, will be received until the time, date, and at the place indicated below, and then publicly opened.

TIME OF OPENING 11:00 A. M. Eastern Standard TIME
DATE OF OPENING March 21, 1962
PLACE OF OPENING Bid Opening Room, GSA Regional Office Building, Room 7122, 7th & D Sts., S. W., Washington, D.C.
BID DEPOSIT OF 20 % OF TOTAL AMOUNT OF BID IS REQUIRED

INSPECTION INVITED BETWEEN 9:00 A.M AND 3:00 P.M Local Time, Monday thru Friday, holidays excepted.
ARRANGE WITH Manager or Depot Commander [redacted]

ISSUED BY Stanley B. Hanes, Chief, Agriculture Branch, PAD, DMS
ADDRESS GSA Building, 18th & F Sts., N. W., Washington 25, D. C.
PROPERTY LOCATED AT Storage Locations as listed on Pages 5 and 6.

(See Opposite)

CONTRACT GS-OOP(S)12954(SCM)

STANDARD FORM 114 A
MARCH 1960
PRESCRIBED BY GENERAL SERVICES ADMINISTRATION REGULATION [illegible] 302.00

SALE OF GOVERNMENT PROPERTY
BID AND AWARD

BID
(This Section to be completed by the Bidder)

DATE OF BID [illegible] March 21, 1962

In compliance with the Invitation identified on the cover page hereof, and subject to all the General Sale Terms and Conditions, Standard Form 114-C, March 1960 Edition, and any Special Conditions contained in the Invitation, all of which are incorporated as a part of this Bid, the undersigned offers and agrees, as set forth in Condition No. 3 of Standard Form 114-C, if this Bid be accepted within 60 calendar days (60 calendar days if no period be specified by the Government or by the Bidder, but not less than 10 calendar days in any case) after the date of Bid opening, to purchase and pay for any or all of the items or lots of property listed on the attached Item Bid page(s) Page 5 [illegible] (and, if a detailed description of property is furnished with this Invitation, as to the parts particularly set forth therein) upon which prices are bid, at the price set opposite each item or lot, and unless otherwise specified in the description or in any Special Conditions, to remove the property within [illegible] calendar days (if no period specified) after notice of acceptance by the Government. The total amount bid is $493,000 maximum and attached is the required bid deposit in the form of check in the amount of $99,000.00 certified

period specified on Page 3 hereof

Envelopes containing bids must be sealed and marked on the face with the name and address of the Bidder, the Invitation number and the date and hour of opening.

BIDDER REPRESENTS *(Check appropriate box)*

1. That he [X] is [ ] is not a small business concern. *(See Standard Form 114-C for definition of small business and small business classifications referred to in 2, hereinbelow.)*

2. If Bidder represents he is a small business concern, he further represents his applicable classification as *(Check one)* [X] (a) [ ] (b) [ ] (c) [ ] (d).

3. (a) That he [ ] has, [X] has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the Bidder) to solicit or secure this contract, and (b) that he [ ] has, [X] has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the Bidder) any fee, commission, percentage or brokerage fee, contingent upon or resulting from the award of this contract, and agrees to furnish information relating to (a) and (b) above as requested by the Contracting Officer. *(For interpretation of this representation, including the term "bona fide employee," see Code of Federal Regulations, Title 41, Part 1-1.)*

NAME AND ADDRESS OF BIDDER (Street, city, zone, and State. Type or print)

HEXAGON LABORATORIES, INC.
3536 Peartree Avenue
New York 69, N.Y.

SIGNATURE OF PERSON AUTHORIZED TO SIGN BID

[illegible]

SIGNER'S NAME AND TITLE (Type or print)

MORTON SURKIN, Vice-President

ACCEPTANCE BY THE GOVERNMENT
(This Section for Government use only)

ACCEPTED AS TO ITEMS NUMBERED

Items 1, 2, 4 and 5.

DATE OF ACCEPTANCE March 22, 1962

UNITED STATES OF AMERICA

BY [illegible]
(Contracting Officer)

TOTAL AMOUNT	CONTRACT NUMBER	TITLE OF CONTRACTING OFFICER
$ 467,400.00	GS-OOP(S)12954(SCM)	Stanley B. Hanes Chief, Agriculture Branch, PAD

Appendix C

(See Opposite)

STANDARD FORM 114-B
MARCH 1950
PRESCRIBED BY GENERAL SERVICES ADMINISTRATION REGULATION 1-IV-302.00

SALE OF GOVERNMENT PROPERTY
ITEM BID PAGE

PAGE NO. 3

INVITATION NO. MPAR-(S)-43

ITEM NO.	ARTICLES FOR SALE	QUANTITY (No. of Units)	UNIT OF MEASURE	TO BE SUPPLIED BY BIDDER: PRICE BID PER UNIT	TO BE SUPPLIED BY BIDDER: TOTAL PRICE BID DOLLARS	CENTS
	QUININE SULPHATE POWDER, APPROXIMATELY 4,762,279 OUNCES (See Pages 5 and 6.)				PRICE BID PER LOT	
1.	See Note Below	238,324	Ounce	Lot	$50,100	
2.	See Note Below	864,130	Ounce	Lot	$180,100	
3.	See Note Below	2,521,512	Ounce	Lot	$493,000	
4.	See Note Below	114,313	Ounce	Lot	$24,100	
5.	See Note Below	1,024,000	Ounce	Lot	$213,100	

TOTAL AMOUNT OF BID : MAXIMUM $493,000

AMOUNT OF BID DEPOSIT: $99,000

DELIVERY:

The purchaser(s) will be required to take delivery of approximately 20% of the amount purchased during the first twelve-month period following the award of a contract and approximately the same amount during each subsequent twelve-month period with the limitation that no more than approximately 20% of the quantity purchased may be withdrawn by the purchaser during any consecutive twelve-month period.

NOTE:

Bidding on the quinine offered herein is restricted to those qualifying as small business concerns. See "Bidder Represents" provision, on page 2 hereof, and "Definition of Small Business", on page 4 hereof.

NOTE:

IF SUCCESSFUL ON ITEM 3
DISREGARD OTHER BIDS

BIDDER IS CAUTIONED TO INSPECT THE PROPERTY

BIDDER'S NAME SHOULD APPEAR ON EACH ITEM BID PAGE CONTAINING A BID

NAME OF BIDDER (Type or print)
HEXAGON LABORATORIES, INC.

114-303

A-34

(See Opposite)

STANDARD FORM 114–C
MARCH 1960 EDITION
PRESCRIBED BY GENERAL SERVICES ADMINISTRATION REGULATION 1–IV–302.00

SALE OF GOVERNMENT PROPERTY
GENERAL SALE TERMS AND CONDITIONS

1. INSPECTION. The Bidder is invited, urged, and cautioned to inspect the property to be sold prior to submitting a bid. Property will be available for inspection at the places and times specified in the Invitation. In no case will failure to inspect constitute grounds for the withdrawal of a bid after opening.

2. CONDITION AND LOCATION OF PROPERTY. Unless otherwise specifically provided in the Invitation, all property listed therein is offered for sale "as is" and "where is." If it is provided therein that the Government shall load, then "where is" means f.o.b. conveyance at the point specified in the Invitation. The description is based on the best available information. However, the Government makes no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose. Except as provided in Conditions No. 8 and 10, no request for adjustment in price or for rescission of the sale will be considered. This is not a sale by sample.

3. CONSIDERATION OF BIDS. The Bidder agrees that his bid will not be withdrawn within the period of time specified for the acceptance thereof following the opening of bids (sixty (60) calendar days if no period be specified by the Government or by the Bidder but not less than ten (10) calendar days in any case) and that during such period his bid will remain firm and irrevocable. The Government reserves the right to reject any or all bids, to waive any technical defects in bids, and, unless otherwise specified by the Government or by the Bidder, to accept any one item or group of items in the bid, as may be in the best interest of the Government. Unless the Invitation otherwise provides, bids may be submitted on any or all items. However, unless the Invitation otherwise provides, a bid covering any listed item must be submitted on the basis of the unit specified for that item and must cover the total number of units designated for that item. In case of error in the extension of prices, unit prices will govern.

4. PAYMENT. The Purchaser agrees to pay for property awarded to him in accordance with the prices quoted in his bid. Payment of the full purchase price, subject to any adjustment pursuant to Condition No. 8, must be made within the time specified for removal and prior to delivery of any of the property. In the event, however, any adjustment is made pursuant to Condition No. 8, then payment must be completed immediately subsequent to such adjustment. The balance of the purchase price after applying the total bid deposit made by the Purchaser under the Invitation (or otherwise the full purchase price) shall be paid to the Contracting Officer in cash, or by certified check, cashier's check, traveler's check, bank draft, or postal or express money order, made payable to the Treasurer of the United States (or, if so specified in the Invitation made payable either to the Government agency conducting the sale or as directed by that agency). The Government reserves the right to apply any bid deposits made under the Invitation by a Bidder against any amounts due to the Government under a contract awarded to him thereunder. In those instances where the total sum becoming due to the Government from the Purchaser on a contract awarded to him under the Invitation is less than the total amount deposited with his bid, the difference will be promptly refunded to him. Also, deposits accompanying bids which are not accepted will be promptly returned to him.

5. TITLE. Unless otherwise specified in the Invitation, title to the items of property sold hereunder shall vest in the Purchaser as and when full and final payment is made, except that if the Invitation provides that loading will be performed by the Government, title shall not vest until such payment and loading are completed. On all motor vehicles and motor-propelled or motor-drawn equipment requiring licensing, a certificate of release, Standard Form 97 (or a State certificate of title if such a certificate of title has been issued to the Government), will be furnished for each vehicle and piece of equipment.

6. DELIVERY AND REMOVAL OF PROPERTY. Unless otherwise specified in the Invitation, the Purchaser shall be entitled to obtain the property upon vesting of title of the property in him. Delivery shall be made at the designated location, and the Purchaser shall remove the property at his expense within the period of time originally specified in the Invitation or within such additional time as may be allowed by the Contracting Officer. The Purchaser shall reimburse the Government for any damage to Government property caused by the removal operations of the Purchaser. If the Purchaser is permitted by the Government to remove the property after the expiration of the period prescribed or allowed for removal, the Government, without limiting any other rights which it may have, may require Purchaser to pay a reasonable storage charge.

7. DEFAULT. If, after the award, the Purchaser breaches the contract by failing to make payment as required by Condition No. 4, or by failing to remove the property as required by Condition No. 6, then the Government may send the Purchaser a fifteen-day written notice of default (calculated from date of mailing), and upon Purchaser's failure to cure such default within that period (or such further period as the Contracting Officer may allow), the Purchaser shall lose all the right, title and interest which he might otherwise have acquired in and to the property as to which a default has occurred. The Purchaser agrees that in the event he fails to pay for the property or remove the same within the prescribed time, the Government at its election and upon notice of default shall be entitled to retain (or collect) as liquidated damages a sum equal to 20% of the purchase price of the item (or items) as to which the default has occurred. Whenever the Government exercises this election, it shall specifically apprise the Purchaser either in its original notice of default (or in separate subsequent written notice) that upon the expiration of the period prescribed for curing the default the formula amount will be retained (or collected) by the Government as liquidated damages. The maximum sum, moreover, which may be recovered by the Government as damages for failure of the Purchaser to remove the property and pay for the same shall be such formula amount. If the Purchaser otherwise fails in the performance of his obligations thereunder, the Government may exercise such rights and may pursue such remedies as are provided by law or under the contract.

8. ADJUSTMENT FOR VARIATION IN QUANTITY OR WEIGHT. When property is sold on a "unit price" basis, the Government reserves the right to vary the quantity or weight delivered by 10% from the quantity or weight listed in the Invitation; and the Purchaser agrees to accept delivery of any quantity or weight within these limits. The purchase price will be adjusted upwards or downwards in accordance with the unit price and on the basis of the quantity or weight actually delivered. No adjustment for variation will be made where property is sold on a "price for the lot" basis.

9. WEIGHING. Where weighing is necessary to determine the exact purchase price hereunder, the Purchaser shall arrange for and pay all expenses of weighing material (unless Government scales are available on the premises). All switching charges shall be paid by the Purchaser. When removal is by truck, weighing shall be under the supervision of the Government and at its option on: (a) Government scales, (b) certified scales, or (c) other scales acceptable to both parties. When removal is by rail, weighing shall be on railroad track scales, or by other means acceptable to the railroad for freight purposes. Government-approved weighing shall establish the exact purchase price and govern the making of full payment thereon.

10. RISK OF LOSS. (1) After mailing notice of award, and prior to passage of title to the Purchaser, the Government will be responsible for the care and protection of the property and any loss, damage, or destruction occurring during such period will be adjusted by the Contracting Officer. (2) After passage of title to the Purchaser, and prior to the date specified for removal, the Government shall be responsible only for the exercise of reasonable care for the protection of the property. (3) After passage of title and after the date specified for removal of the property, or any extension approved in writing by the Contracting Officer, all risk of loss, damage, or destruction from any cause whatsoever shall be borne by the Purchaser.

11. LIMITATION ON GOVERNMENT'S LIABILITY. Except for transportation charges when a return of property at Government cost is authorized by the Government, the measure of the Government's liability in any case where liability of the Government to the Purchaser has been established shall not exceed refund of such portion of the purchase price as the Government may have received.

12. ORAL STATEMENTS AND MODIFICATIONS. No oral statement or representation by any representative of the Government, changing or supplementing this contract or any Condition thereof, is unauthorized and shall confer no right upon the Purchaser.

13. COVENANT AGAINST CONTINGENT FEES. Purchaser warrants that no person or agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial agencies maintained by the Purchaser for the purpose of doing business. For breach of this warranty, the Government shall have the right to annul this contract without liability or at its option, to recover from the Purchaser the amount of such commission, percentage, brokerage, or contingent fee, in addition to the consideration herein set forth.

14. OFFICIALS NOT TO BENEFIT. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, unless it be made with a corporation for its general benefit.

15. DISPUTES. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Purchaser. The decision of the Contracting Officer shall be final and conclusive unless, within thirty (30) days from the date of receipt of such copy, the Purchaser mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Purchaser shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Purchaser shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

16. DEFINITIONS. As used throughout this contract, the following terms shall have the meaning set forth below:

(a) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department, and the head or any assistant head of the Federal agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Secretary.

(b) The term "Contracting Officer" means the person accepting the bid in whole or in part on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of the representative's authority.

INSTRUCTIONS TO BIDDERS

1. BID DEPOSIT. Where a bid deposit is required by the Invitation, such deposit must accompany the bid and be furnished in cash, or by postal or express money order; cashier's, certified, or traveler's check; or a combination thereof; made payable to the Government agency conducting the sale unless otherwise directed in the Invitation. An irrevocable commercial letter of credit may be used to cover the bid deposit or the balance of the purchase price should an award be made unless otherwise directed in the Invitation.

2. PREPARATION OF BIDS. Bids shall be filled out in ink, indelible pencil, or typewriter, with all erasures, strike overs, and corrections initialed in ink or indelible pencil.

DEFINITION OF SMALL BUSINESS

1. For this purpose, a small business concern is a concern which, together with its affiliates, falls within one of the classifications set forth in 2 below; is independently owned and operated; and is not dominant in its field of operation. (See Code of Federal Regulations, Title 13, Part 121, as amended, if additional information is desired.)

2. Small Business Classifications.

(a) Primarily engaged in manufacturing and employs not more than 500 persons.

(b) Primarily engaged as a nonmanufacturer, except as specified in (c) below, and had an average annual sales volume or receipts, less returns and allowances, of $5,000,000 or less for its preceding three fiscal years.

(c) Primarily engaged in the purchase of materials not domestically produced and had an average sales volume or receipts, less returns and allowances, of $25,000,000 or less for its preceding three fiscal years.

(d) Certified as a small business concern by the Small Business Administration.

U.S. GOVERNMENT PRINTING OFFICE : 1960 O—548888

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1195

HEXAGON LABORATORIES, INC., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this action in the Court of Claims against the United States to recover the difference between the contract price and the world market price of surplus quinine sulfate powder which the United States had contracted to sell to it. The contract, entered into on March 22, 1962, provided that the petitioner was to take delivery of the quinine powder in the five succeeding years. The contract contained the following standard clause — Number 11 — regarding the government's liability (Pet. App. 26):

> LIMITATION ON GOVERNMENT'S LIABILITY. * * * the measure of the Government's liability in any case where liability of

216-495—66

> the Government to the Purchaser has been established shall not exceed refund of such portion of the purchase price as the Government may have received.

Under the direction of the Director of the Office of Emergency Planning (see Def. Exh. 6),[1] the General Services Administration cancelled the contract in September 1964. This was done because, after the execution of the contract, the Department of Defense discovered that, while quinine had previously been thought to have become obsolete in the treatment of malaria, "[d]uring the past year there has been increasing evidence of the existence, in certain areas of the world, of strains of the malaria parasite which are immune to all known drugs except natural quinine. The principal area involved is Southeast Asia. Quinine is being returned to use in the military supply system after an absence of many years" (Def. Exh. 10).

On the motion of the United States for summary judgment, the Court of Claims held that the plaintiff's recovery for breach of contract was limited by clause Number 11, *supra,* to the refund of the purchase price which the government had received. In two previous cases, *Freedman* v. *United States,* 320 F. 2d 359, 362 and *Benjamin* v. *United States,* 348 F. 2d 502, 520 (Pet. App. 13), the court had held that this contractual provision was inserted into the Standard Sales form agreement in part "to meet those instances

[1] "Def. Exh." refers to the Exhibits attached to the motion for summary judgment filed in the Court of Claims and included in the Record before this Court.

in which * * * a need for the property develops after it has been declared surplus and offered for sale" (*Freedman, supra,* 320 F. 2d at 362). Since the court found that there was "no litigable issue as to the reality of the [government's] need" here (Pet. App. 13), it granted the government's motion.

The court correctly applied the express terms of clause Number 11 of the contract to limit the government's liability, in the event of a cancellation of the contract, to a refund of the purchase price. As the court held, such provisions are clearly applicable in circumstances like those in this case, where unanticipated military needs necessitated termination of the contract to conserve the quinine supply. See *North & Judd Mfg. Co.* v. *United States,* 84 F. Supp. 649, 650, where the court applied a provision similar to the one in this case to confine the government's liability where a contract for the sale of surplus steel had been cancelled because the "steel was urgently needed to meet unpredictable requirements for rifle clips; that is to say, army requirements which were not predictable at the time the steel was declared to be surplus property." See also *Erie Coal Co.* v. *United States,* 266 U.S. 518, 520–521; *United States* v. *Weisbrod,* 202 F. 2d 629, 632–633 (C.A. 7), certiorari denied, 346 U.S. 819; *Freedman* v. *United States,* 320 F. 2d 359, 362 (Ct. Cl.).

Nor is there substance to petitioner's contention that, contrary to the view of the Director of the Office of Emergency Planning, there was insufficient need to cancel the contract because the United States could have met defense requirements on the open mar-

ket, although at a price higher than the contract price (Pet. 4, 6). The record shows that there was, in fact, no adequate available supply of quinine to satisfy the requirements of the National Stockpile caused by the crisis in Southeast Asia. In March, 1965, shortly after the contract in this case was cancelled, the Department of Defense was unable to find quinine available from commercial sources in the United States to meet an urgent demand for military purposes (Def. Exh. 8), and the President consequently authorized the release of 150,000 ounces of quinine from the National Stockpile for use by the Department of Defense (Def. Exh. 12). There is therefore no occasion to review the factual finding of the Court of Claims that petitioner "has raised no litigable issue as to the reality of" the government's need (Pet. App. 13).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1966.